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Supreme Court, U.S.
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No. 95-1154

In The

Supreme Court of the United States

October Term, 1995

DALKON SHIELD CLAIMANTS TRUST,

Petitioner,

v.

SUSAN SHADBURNE-VINTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court reverse seventy years of constitutional development upholding the rights of a legislature to withdraw a statutory immunity granted to a class of defendants, where a rational legislative purpose supported that action?

2. Should the Court now extend the narrow scope of an obscure 1925 decision (*William Danzer & Co. v. Gulf & Ship Island R.R.*, 268 U.S. 633) applicable only to statutory causes of action, in order to limit a legislature's right to abolish special-interest statutory immunities?

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STATUTE

Oregon Revised Statutes 30.905 1

BRIEF IN OPPOSITION

Respondent Susan Shadburne urges that the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit be denied for the reasons set forth below.

STATEMENT OF THE CASE

The petition of the Dalkon Shield Claimants Trust seeks review of a decision of the appellate court reversing judgment on the pleadings, entered by a judge of the United States District Court for the District of Maryland. The Maryland federal court had declared unconstitutional a remedial statute enacted by the Oregon Legislative Assembly, limiting the scope of that state's statute of ultimate repose applicable to certain classes of product liability actions. Ore. Rev. Stat. 30.905.

Shadburne is one of approximately 200,000 women who asserted claims for serious personal injuries and consequential damages from use of the Dalkon Shield intrauterine contraceptive device (IUD), manufactured and marketed by A. H. Robins Company (Robins) from 1971 to 1974, when it was withdrawn from the market. As did many of those women, she brought suit against Robins, which ultimately invoked chapter 11 bankruptcy in August 1985. By that time, however, her action and those of a number of other Oregon residents had been dismissed on the basis of their state's statute of repose. That statute denied a remedy after lapse of time from purchase of the product, even where the plaintiff was

blamelessly unaware of the cause of her subsequent injuries. The dismissal of a number of the Oregon Dalkon Shield claims was appealed to the Fourth Circuit Court of Appeals, and the appeal was pending when the bankruptcy petition was filed in 1985.

Recognizing that a victim compensation fund was to be created as a result of that bankruptcy, the Oregon legislature took steps during its pendency to abolish the statute of repose applicable to IUD claims[1], just as it had earlier done with respect to asbestos claims, and subsequently would do with respect to silicone breast implant claims.

When petitioner Dalkon Shield Claimants Trust (the Trust) was created as a result of the Robins plan of reorganization, Shadburne was permitted to file her claim, which was acknowledged by the Trust and an inadequate settlement offer made. Following Trust procedures, she rejected that offer and was "certified" by the bankruptcy court to pursue litigation against the Trust. In the course of that litigation, however, the Trust sought

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[1] Petitioner cynically asserts (p. 3) that the Oregon legislature was "responding to the political pressure exerted by the personal injury plaintiffs' bar to enact revival statutes directed at the manufacturers of whatever product is the most recent topic of litigation publicity." However, only one dissenting vote against this amendment was recorded in both houses of the Oregon legislature, who recognized that without the amendment, the women of Oregon would be the only victims of the notorious Dalkon Shield not able to be compensated from a $2.3 billion fund established by the manufacturer and approved by the bankruptcy court in Richmond.

judgment on the pleadings to declare the amended Oregon statute unconstitutional as violating its due process rights.

More than ten years after her action was first brought – in Maryland, where the Dalkon Shield was invented and developed – a district judge dismissed her action as untimely filed, relying on the Oregon repose statute and declaring its amendment unconstitutional under the 70-year-old *William Danzer* decision of this Court.

SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari since further review is undesirable, as the issue presented in the district court was narrow and non-precedential.

Moreover, this Court in a consistent line of decisions since at least 1976 has adopted and enunciated the "rational legislative purpose" test applicable to retroactive legislation, which test was followed on carefully articulated grounds by the court of appeals.

Finally, contrary to petitioner's assertion, the few decisions of other circuits dealing with retroactive abolition of a statute of repose have unanimously held such legislative acts to be constitutional.

ARGUMENT

The Court should deny the petition since the decision below is consistent with unbroken constitutional authority of more than twenty years.

The Court should deny the petition since the decision of the court of appeals is without significant precedential value, as consistent with "landmark" rulings of the Court in 1976 (*Usery v. Turner Elkhorn Mining Co.*, 428 U. S. 1) and 1984 (*Pension Benefit Guaranty Corp. v. Gray*, 467 U. S. 717). Moreover there is no split of authorities at the circuit court level, and the narrow and unusual facts here do not warrant reversal of that line of authorities in this case.

Petitioner would have the Court review and overturn a cogently reasoned and clearly articulated opinion of Senior Judge Chapman, reinstating plaintiff's undoubted right to compensation for her injuries caused by the Dalkon Shield intrauterine device. The only basis asserted for disallowance of her claim was the Oregon statute of repose for product liability claims, which has since been amended to exclude injuries caused by IUDs and other clearly dangerous products.

By its petition, the Dalkon Shield Claimants Trust would have the Court reject and reverse twenty years of consistent constitutional decisions by this Court and lower federal courts upholding the retroactive application of a legislature's power to modify its own statutory immunities, as against due process claims. Petitioner urges the Court to ignore those decisions and to vest potential defendants with a new constitutional right or "immunity" to be free from litigation – even where a

rational legislative purpose is found for extending a cause of action to past conduct. For the first time, petitioner would have this Court elevate to constitutional status a distinction heretofore found in state choice of law rules, which are by their nature arbitrary, a distinction between categories of rights designated "procedural" and "substantive."

Suffice it to say that the decision of the court of appeals is squarely within the mainstream of federal constitutional law, while the proposition advanced by the Trust would be revolutionary – and by its own admission, would disrupt carefully formulated compensation schemes not only for victims of the Dalkon Shield, but also for the asbestos victims and for thousands of women injured by silicone breast implants, who have yet to receive their day in court.

A. The court of appeals opinion properly applies the "rational legislative purpose" test for retroactive enactments, a test unchallenged in modern constitutional law.

The appellate court's exposition of the constitutional principles applicable to the Oregon amending statute makes it clear that there is no split of authorities between various federal courts or circuits, or any deviation in the clear line of cases that began with *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). That decision has been followed by the Court in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984), and most recently in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), and *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995).

All of those decisions apply a standard which has come to be known as the "rational legislative purpose" test, giving due deference to the legitimacy of legislation reflecting reasonable public policy. As stated in *Turner Elkhorn, supra,* this Court has established

> . . . that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.

428 U.S. at 15. There is no *per se* or vested right, nor any grounds to complain unless the legislative purpose or process is somehow deficient. Significantly, none of those decisions turn on an artificial distinction between substantive and procedural rules of timeliness, which state courts have relied on to carve out choice of law standards. That distinction has not been elevated to constitutional status by decisions of this Court, nor should it be in this case.

Petitioner has not contended either in the district court nor on appeal that the Oregon Legislative Assembly acted irrationally or arbitrarily in granting relief to Dalkon Shield victims. Rather, petitioner asserts that the legislature simply lacked power in any event to abolish or modify the statute of repose which it had itself imposed, arguing that the lawmakers had created an irrevocable "immunity" from suit.[2]

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[2] As will be seen below in Part E, petitioner's contention against retroactivity ignores the fact that when Ms. Shadburne was injured in 1976, the statute of repose in issue had not even been enacted. Apparently non-retroactivity is a one-way street.

However it is difficult to fathom a genuine difference between the asserted immunity or "vested" right and the "otherwise settled expectations" of a potential defendant in the language of *Turner Elkhorn*, 428 U.S. at 16. Significantly, petitioner has not cited to the Court a recent constitutional decision where a legislative enactment was invalidated for removal of such "immunity." The only constitutional authority referred to from the modern era is *International Union of Electrical Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976). The Court in *Robbins & Myers* in fact reversed dismissal of a fair employment case, holding (as held here) that retroactive application of a remedial statute does *not* offend due process where the legislative purpose was appropriate.[3]

Most recently, the Court in *Plaut v. Spendthrift Farms, Inc.*, 115 S.Ct. 1447 (1995), has made it clear that absent a final judgment in favor of the defendant, the due process argument in unavailing.

B. The court of appeals decision in this case is consistent with decisions of all other circuits which have considered the issue.

The appellate court considering the issue of retroactivity pointed primarily to a recent ruling directly on point from its "sister circuit," the District of Columbia

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[3] Justice Rehnquist in *Robbins & Myers* found a contention identical to that advanced by petitioner here to " . . . rest on an unwarrantedly broad reading of [the Court's] opinion in *William Danzer Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633. . . . " *See infra*, at Part C.

Circuit, a more clearly focused case in which certiorari was denied. In *Wesley Theological Seminary v. U.S. Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), the appeals court held that legislative amendment of a statute of repose applicable to manufacturers while the action was pending did not violate the defendant's due process rights. Petitioner here concedes that *Wesley* is directly contrary to its position, and attempts to argue that there is a "conflict among the lower federal courts." (P. 11, fn. 4.)

In fact, every federal court decision which has been found by either party, relative to the constitutional issue raised by the petitioner, has *upheld* the legislative action even where the statute in question was a statute of repose. *See, e.g., Murphree v. Raybestos-Manhattan, Inc.*, 696 F.2d 459 (6th Cir. 1982); *Independent School District No. 187 v. W.R. Grace & Co.*, 752 F.Supp. 286 (D. Minn. 1990). *See also, Thornton v. Cessna Aircraft Co.*, 886 F.2d 85 (4th Cir. 1989).

C. The *Danzer* decision on which petitioner chiefly relies is readily distinguishable on several grounds.

Ultimately the petitioner has a single basis for its reliance in this case, namely, the decision of this Court seventy years ago in *William Danzer & Co. v. Gulf & Ship Island R. Co.*, 268 U.S. 633 (1925). The court of appeals after due consideration held that " . . . in light of the more recent Supreme Court precedent," the analysis of *Danzer* and related cases "is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." (Opinion, p. 11a.) The appellate court rightly

held that today, "the relevant inquiry is whether or not the legislation serves a legitimate legislative purpose that is furthered by rational means." (12a.)

However, in plaintiff's view it was unnecessary for the Court to overrule *Danzer* and its very sparse progeny in order to affirm the constitutionality of the amended statute of repose here. For *Danzer* is poor precedent indeed; it involved *not* a statute of repose at all, affecting (as with the Oregon statute) an existing common law right, but rather a statutory cause of action under the early Interstate Commerce Act, which Act contained its own temporal limitation of the shipper's remedy. That was clearly the basis of the Court's ruling in 1925.

This very narrow applicability of *Danzer* was made clear by the Court itself in its decision twenty years later in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). Although the appellate decision in the present case has grouped *Chase Securities* with *William Danzer* as authorities "no longer valid" for purposes of constitutional analysis (p. 11a), actually *Chase Securities* may be read as wholly consistent with the present court of appeals ruling. For Justice Jackson in that case relegated the scope of *Danzer* to a mere footnote (325 U.S. at 312, fn. 8) and distinguished the *Danzer* case as one "where a statute in creating a liability also put a period to its existence. . . ." *Danzer* was seen then as the type of case in which the limitation was "directed to the newly created liability so specifically as to warrant saying that it qualified the right." (*Ibid.*)

Based both on recent and also on long-established constitutional authority, *Danzer* is inapplicable to judge

the retroactive amendment of a statute of respose in the present context of a common law tort claim. And to the extent that *Chase Securities* is relevant, it supports the lower court's decision, since it expressly distinguished the potential statutory cause of action under the Blue Sky Law, from a common law cause which was unaffected by that act's limitations.

To repeat, there is simply no constitutional authority – none at all, neither modern nor ancient – for the proposition advanced by petitioner, that a common law cause of action may not be "revived" by a state legislature with second thoughts, even when that reconsideration has a rational basis in economic policy or other public policy. What the legislature is permitted to take away, by statute of respose or otherwise, it surely may give back later, equally without impairment of constitutional rights to due process.

D. Choice of law rules and distinctions have never been given constitutional stature.

What petitioner seeks here from this Court is truly revolutionary – to create a new constitutional right never before recognized in any reported decision: an *irrevocable immunity from litigation.*

In citing appellate authority supposedly in support of its novel position, and in arguing for "vested" rights here based on limiting legislation in effect for merely a few years, petitioner cleverly intermixes venerable principles of state choice of law rules with constitutional principles of due process. However the court of appeals was not confused and made the appropriate distinctions

(p. 6a), holding expressly that its own prior decisions such as *Goad v. Celotex Corp.*, 831 F.2d 508 (4th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), dealing with choice of law issues, had no precedential value here.

The lower court in this case had been misled (p. 32a) to follow its choice of law rulings in *President and Directors of Georgetown College v. Madden*, 505 F.Supp. 557 (D. Md. 1980), *aff'd in part*, 660 F.2d 91 (4th Cir. 1981). However the court of appeals rightly found *Goad* and similar decisions not to apply since they "separate statutes of limitations from statutes of repose for choice of law purposes, and this case presents a constitutional issue." (P. 7a).

The court of appeals opinion likewise found "inapplicable in resolving the constitutional issue" the circuit's own 60-year-old decision in *Link v. Receivers of Seaboard Air Line Ry.*, 73 F.2d 149 (4th Cir. 1934), since "*Link* is based upon the same outdated principles upon which *Danzer* is based." (P. 14a.) *Link* just as *Danzer*, involved a statutory (and statutorily limited) cause of action – retroactive amendment to a South Caroline law extending a class of creditors' priority over mortgage lines.

Finally, the appellate court's opinion in this case points out that

> [t]he district court's reliance upon *Dinh [v. Rust International Corp.*, 974 F.2d 500 (4th Cir. 1992)] is misplaced because in that case the appellant *agreed* that the statute of repose created substantive rights in the defendant which once vested could not be legislatively destroyed. *Dinh*, 974 F.2d at 501.

Because the issue was not contested, it was not before the court (p. 14a.) The court might also have noted that in *Dinh*, the issue again did not arise under the U. S. Constitution but rather involved interpretation of a state statute or at most the Constitution of the Commonwealth of Virginia, involved assertion of legislative power to extinguish a cause of action. Significantly, since it was determined that "no right ever came into being" in favor of plaintiff under those documents, 574 F.2d at 502, obviously this Court found it unnecessary to resolve due process issues under the federal laws.

None of the decisions cited by the petitioner comes to grips with the constitutional issue, and truly none is "in conflict" with the court of appeals decision here. All involve either statutory interpretation, or choice of law rules, or both. In short, not a single authority has been cited by the petitioner, nor found by the court of appeals, positing a pertinent distinction between statutes of limitations and of respose for constitutional purposes.

E. The appellate decision was correct for alternate reasons not expressed in its opinion.

Finally, there are several additional or alternate reasons not cited in the court of appeals opinion why certiorari should be denied, since the facts of the case and the legislation attacked by the petitioner do not squarely or fairly present a determinative constitutional issue.

First, the statute of repose at issue here was not even in effect in 1976 when plaintiff Susan Shadburne experienced her devastating injuries. It was enacted broadly in 1977, and limited to exclude IUD victims in 1987, as the

court found. Should due process requirements be found to restrict the power of the Oregon Legislative Assembly retroactively to modify its statute of respose, no less should the same requirements in fairness and common sense dictate that the legislative body may not in the first instance diminish the plaintiff's "vested" rights. *See Wesley Theological Seminary, supra,* 876 F.2d at 122.

Secondly, the district court here overlooked the fact that the Oregon appellate courts have construed their overall statutory scheme (*i.e.,* statute of repose read together with the statute of limitations) to allow *ten years* rather than eight years for an IUD plaintiff to bring suit. *Dortch v. A. H. Robins Co., Inc.,* 650 P.2d 1046 (Ore. App. 1982); *see also Border v. Indian Head Inds., Inc.,* 792 P.2d 111 (Ore. App. 1990). Since Ms. Shadburne brought suit within the enlarged period, the constitutional issue might have been avoided.

Finally, with respect to the public policy issues germane to the "rational legislative purpose" test, it should be pointed out that the original defendant, A. H. Robins Company, voluntarily entered chapter 11 bankruptcy in 1985 expressly to resolve its liabilities to tens of thousands of victims of the Dalkon Shield, most of whom were at that time blamelessly unaware of their cause of action. The Oregon legislature obviously responded in part to that filing; and after a fund of more than $2 billion has been set aside to compensate those victims, it would be most unjust if the *only* IUD victims *not* able to secure compensation are those few women from states which had previously enacted legislation to protect local manufacturers from truly "stale" claims. It would be ironic and offensive to every notion of fairness and public policy if

the prime beneficiary of the Oregon repose statute turns out to be *not* a manufacturer whose business is sought in Oregon, nor even an insurer seeking to limit its risks, but a trust vehicle created by the bankruptcy court in Richmond for the express purpose of compensating Ms. Shadburne and other victims of the notorious Dalkon Shield.

CONCLUSION

For all of the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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